No. 470

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 470

ABBATE BROTHERS, INC., ET AL.,
Appellants,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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THE SUNTHORP-WARREN PRINTING COMPANY, C. 1956

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JURISDICTIONAL STATEMENT.

In compliance with Rule 13 of this Court, the Appellants herewith present their jurisdictional statement, and in that behalf respectfully submit as follows:

A.

OPINION BELOW.

The opinion of the Supreme Court of Illinois, from whose judgment this appeal is taken, appears at 11 Ill. 2d 337 and at 142 N. E. 2d 691, as *Abbate Brothers, Inc., et al.* v. *City of Chicago.* The opinion is set forth in Appendix A, Page 9. The trial court judgment (Appendix A, Page 17) and Master's report (Appendix A, Page 19) are not reported in any official or unofficial reporter system.

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

(i) Nature of the Proceeding.—This was an action filed to declare unconstitutional certain provisions of the Municipal Code of Chicago, requiring modifications to elevators which had been installed in conformity with the code in force at the time of their installation. Plaintiffs also sought an injunction restraining the municipality from enforcing against them the penal provisions of the amendatory ordinance. The amendatory ordinance is set forth in Appendix B, Page 34.

(ii) Date of Judgment Sought to Be Reviewed.—On May 23, 1957, the Illinois Supreme Court reversed the judgment of the Circuit Court of Cook County. Notice of Appeal was filed on July 16, 1957 in the Supreme Court of Illinois.

(iii) Statutory Provision Conferring Jurisdiction.—The jurisdiction of the Supreme Court of the United States over this appeal is conferred by 28 U. S. C. 1257 (2).

(iv) Cases Sustaining Jurisdiction.—This Court has expressly held that its appellate jurisdiction extends to cases in which the validity of a municipal ordinance has been upheld when the claim has been made that such ordinance is repugnant to the Constitution of the United States. These holdings appear in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114, 72 L. Ed. 801, 810, 48 S. Ct. 489; *Jamieson* v. *Texas*, 318 U. S. 413, 414, 87 L. Ed. 869, 871, 62 S. Ct. 669; and *Poulos* v. *New Hampshire*, 345 U. S. 395, 402, 97 L. Ed. 1005, 1112, 73 S. Ct. 760.

C.

QUESTIONS PRESENTED BY THE APPEAL.

Where property has been improved in compliance with the statutes in force at the time of erection of the improvement, and the operation of said improvements has been conducted over a period of many years with a comparatively low accident rate, and no grounds are advanced for any belief that the operation has become more hazardous:

1. May the legislature, without due process of law, require substantial alterations in the structure thus erected?

2. May such alterations be required solely upon the basis of the development of technological advances subsequent to the erection of the improvement?

3. If the State has such power, may it be exercised with reference to premises not accessible to the general public?

D.

STATEMENT OF THE CASE.

The 111 appellants who have joined in this appeal are the owners of 141 out of a total of 166 units comprising the South Water Produce Market District, the primary distribution center for fruits, vegetables and produce within the City of Chicago, Illinois. The units, although separated by common walls, are entirely housed within six buildings, each three stories in height. Each unit is separately owned under a cooperative plan, and has a loading platform at the front and rear on the first-floor level. The produce is stored within the units and is distributed to the different levels by freight elevators installed within each unit.

Each of the elevators is of the electric traction power freight type with hand cable control and electric magnet brake. The shaft length from basement to third floor does not exceed 33½ feet. The approximate speed of the elevators is 50 feet per minute as compared with 200 feet for most other types.

The elevators in question were installed some thirty years ago at the time of the erection of the buildings. The elevators were periodically inspected by the City and were found to comply with the existing ordinances until July 1, 1954. On that date, approval was refused because of the enactment of a new ordinance, whose validity, as applied to this situation, is here under attack.

The elevators are used by a specialized class of employee known as "hustlers" for the movement of produce within the units, and are not accessible to the public or, normally, to other employees.

The "hustlers" are specially trained and skilled in the operation of the elevators, and over the years the accident rate incident to their operation has been quite low, even when compared with elevators of more advanced types. When operated normally, the elevator gates close automatically as the car moves away from the floor, but the gates can be opened manually at any floor even though the car be elsewhere. The elevators are equipped with brakes which, when set, will prevent the operation of the elevator from any floor other than that at which the car has been stopped, although it is the practice of the "hustlers" to avoid use of the brake.

On and after July 1, 1954, the municipal inspectors denied approval to the elevators in question upon the basis of a new ordinance which provided that every existing power elevator must be equipped with locks to prevent the operation of the elevator unless the elevator doors be closed. As to the appellants' elevators, practical compliance

with the new ordinance can be accomplished by one of two methods: an interlocking contrivance can be installed at a cost of $700 per unit, but after installation, the services of a full-time elevator operator will be required at a salary estimated at about $4,000 per year for each elevator; or, in the alternative, a completely automatic system can be installed at an estimated cost of $2,400 to $2,800 per elevator.

The amendatory ordinance deprives the appellants of the use of their elevators until its provisions have been complied with.

The appellants filed an action in the Circuit Court of Cook County challenging the validity of the ordinance as applied to their situation. In their complaint, the appellants charged that the ordinance violated, *inter alia*, the appellants' rights under the Fourteenth and the Fifth Amendments to the Constitution of the United States, constituting a deprivation of appellants' property without due process of law (complaint, Abstract Page 21, Record Page 3). This contention was sustained by the trial court (Judgment, Abstract Page 56, Record Page 3). The city appealed, and appellants restated their position in their appellate brief and in oral argument on appeal. The Supreme Court of Illinois rejected the contention (Record Page 11), citing *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 90 L. Ed. 1096, as follows:

> "Little need be said on the due process question * * * in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

E.

THE QUESTIONS ARE SUBSTANTIAL.

The issue raised by this appeal may well be termed a matter of first impression in this Court. Numerous opinions have been rendered by both Federal and State Courts dealing with the propriety of the application of police power legislation to structures erected in compliance with the law existing at the time of construction. Each case has turned on its own facts, with correspondingly varied results, so that by choosing the proper excerpts, it is possible to establish almost any position one may care to take within this area of jurisprudence.

Never, however, has this Court addressed itself to the propriety of requiring substantial alterations in an improvement lawfully erected and not accessible to the general public, where the legislature has acted, not to ameliorate a demonstrated peril, but solely upon the basis of a technological advance which has been developed subsequent to the erection of the structure.

Novel devices and improvements are presently being introduced with a frequency heretofore unknown. That which is put into production today can become obsolete tomorrow. Mammoth multi-unit structures are erected, at tremendous cost, in the business districts of large municipalities, employing the most modern devices and equipment then known to science; a scant ten years thereafter the plumbing, heating, ventilating and elevator systems of such buildings may be archaic, as viewed by an overly zealous inspector in the light of subsequent industrial and scientific developments.

In the past, the producers of such new equipment have been required to sell them upon the basis of intrinsic excellence. They were able to induce customers to adopt their innovations only if they could demonstrate in open

competition, the obvious and compelling superiorities of the new contrivance over the old.

If the position of the defendant municipality in this litigation be sustained, it will henceforth be necessary for the promoter of a new device to sell his wares in the legislative market only. If the promoter can convince a legislative body of the necessity for installation of his innovation, it will be unnecessary to address himself to any other market, for the simple reason that legislative fiat will compel purchase and distribution of his commodity.

Even less happily, should a legislative body be not altogether convinced of the overriding necessity for modification of existing structures according to the nature of the contrivance, nevertheless, if bent upon mischief, the legislators may still create for the entrepreneur the market which his commodity could never find on its own merit.

The most significant distinction between a republic and other forms of government is the concept that rights of citizens are not dependent upon the whim of the individuals charged with the duties of public office. It is essential to the maintenance of this concept that there be some point at which the legislative determination of the necessity for interference with existing property rights, shall be not binding upon the courts. If that point be not reached in this case, it is hard to see how it can ever be found. If the position of the defendant municipality be sustained in this action, no property right of any citizen can have any value other than may from time to time be assigned to it by the controlling legislative body.

In the instant case, the municipality has proceeded under the guise of the police power. No question of the general welfare is involved; the elevators owned by the appellants are used only by special employees trained and experienced in their use. No special peril has ever been suggested; at the time of the hearing, the 141 elevators owned by appel-

lants had been operated for more than *eighteen years* without an accident. The conclusion is inescapable that the legislative body of the City of Chicago has not intervened here in behalf of the general public welfare. The sole beneficiary will be the purely private interest of the promoters of the device.

The Fourteenth Amendment to the Constitution of the United States provides that "no State shall * * * deprive any person of life, liberty or property, without due process of law * * *." In the face of this clear prohibition, the State of Illinois, acting through the defendant municipality, has told the appellants that they may not use their structures for the purpose for which they have been erected unless they first make their peace with the developers and vendors of the contrivance prescribed by the ordinance.

The Illinois Supreme Court justifies this abridgement of constitutional rights by citing *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80, 90 L. Ed. 1096, which dealt with the requirement of installation of sprinkler systems in lodging houses to reduce fire hazard. That case simply provides no analogy. Certainly, there is an area within which the overwhelming necessity for the protection of the public welfare justifies a legislative intrusion upon constitutional rights. But unless legislative abridgment of constitutional rights be held within that area, these rights rapidly will be dissolved.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Illinois.

Mr. JUSTICE DAILY delivered the opinion of the court:

This appeal, prosecuted by the city of Chicago and duly certified to this court by the trial judge, is from a judgment of the circuit court of Cook County which declared unconstitutional and void sections 79—1.4 and 79—106 of the Municipal Code of Chicago, insofar as they require the installation of certain safety devices on elevators owned or operated by appellees.

The record reveals that the 111 appellees own 141 separate units, out of a total of 166 units, housed in six buildings comprising the South Water Produce Market District, a distribution center for fruits, vegetables and produce. Each building is three stories high and has a common roof and basement; the units within the buildings are separated by common walls, are 80 feet deep, and having loading platforms at front and rear on the first floor level. Each unit is separately owned under a co-operative plan and appellees, or their tenants, conduct their businesses from one or more units. Merchandise they buy and sell is stored in the buildings and is distributed to the different levels by means of freight elevators.

Each of the units here involved is improved with an elevator of the same type, viz., an electric traction power freight elevator with hand cable control and electric magnet brake, which travels upwards and downwards in a shaft or hoistway a maximum distance of 33 feet 5½ inches, (from basement to third floor,) at an approximate speed of 50 feet per minute. These are electric-worm gear elevators and all were installed when the buildings were erected some 30 years ago. The electric motor for each elevator is set

in a housing located at the top of the shaft; the elevator car is suspended on cables. Power is actuated by a continuous cable which runs in two lines along the side of the shaft from its top to its bottom, a hand pull on either of these ... es being sufficient to engage the power and to cause movement in the direction desired. Between the two control lines there is suspended a center line rope which brakes the elevator when pulled downward and it appears that all three of the said lines, or ropes, hang about three feet from the front of the shaft.

There is an opening into the shaft at each level of the building. Those at the first, second and third floor levels have gates which are horizontal sliding panels, center bi-parting, the halves sliding away from one another in a vertical plane. Such gates, or doors, are either wire mesh or solid metal, the latter type having a glass panel in the upper half which permits vision into the shaft. When operated normally the gates close automatically as the car moves away from the floor, but they can be opened manually at any floor even though the car is not at that floor. Because of this feature of the doors and the proximity of the control cables to the front of the shaft, it is possible to reach into the shaft and control the operation of the elevator from any level regardless of the location of the elevator. This cannot be done if the brake is set on the elevator but the practice of appellees' employees is to leave the brake unlocked, thus permitting exterior operation from any level. As a result the car may be removed from a level without the knowledge of the employee who took it there, the open doors leave the shaft unguarded, and employees leaning in to reach the controls must maneuver in time to avoid the moving car. At the basement level the shaft doors are of solid steel, hinged on the side and center bi-parting, and also serve as fire doors.

Appellees' elevators were periodically inspected by the

city and were found to comply with existing ordinances up to July 1, 1954. After that date approval was refused and appellees were served with notice to make changes, alterations and repairs necessary for compliance with section 79—1.4 of the Municipal Code. This section was first enacted July 16, 1952, and provided as follows: "On or before July 1, 1953, every existing power elevator shall be equipped (or such equipment shall have been contracted for) with hatchway door interlocks of the hoistway unit system type which shall comply with all provisions of this chapter." Other provisions of the chapter defined a hatchway door interlock as a device "to prevent the operation of the machine to move the car away from a landing unless the hatchway door at the landing is in a closed and locked position; and to prevent the opening of the hatchway door from the landing side except by special key, unless the car is at rest within the landing zone, or is coasting through the landing zone, with its operating device in a stop position." A hoistway unit interlock system is defined as: "An interlock system which will prevent the operation of the car unless all hatchway doors are locked in a closed position." Such devices would not permit the method of operation practiced by appellees and their employees.

On July 28, 1954, section 79—1.4 was amended to provide that: "On or before July 1, 1954, every existing power elevator, except rope-gearded hydraulic elevators, steam elevators and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of the chapter." Shortly after the latter enactment, appellees, who had not complied with the original ordinance, commenced this proceeding for a declaratory judgment that the amended ordinance is an improper exercise of the police power which deprives them of their property without due process of law, that the classification which serves to except certain types of elevators is discriminatory and unconstitu-

tional, and that the ordinance is unreasonable and void insofar as it applies to their elevators.

The master, who heard the evidence in the cause, concluded from principles established by the decisions of this court that the city had the power both to pass the ordinance and to give it retroactive effect, and that it was a reasonable and proper exercise of the police power. However, because he could see no reasonable basis for excluding the excepted types from its operation, he concluded section 79—1.4 created an arbitrary and discriminatory classification which rendered it void. The trial court, by a judgment entered July 19, 1956, concurred with the latter conclusion of the master, but held in addition that the retrospective application of the ordinance was an improper exercise of the police power, that it was confiscatory and void as applied to appellees' elevators, and that the resulting public benefits did not justify the damage and burden to appellees. The court refused to consider a supplemental pleading filed July 13, 1956, which set forth that a further amendment to section 79—1.4 had been introduced before the city council, and which prayed that the cause be continued for a reasonable time pending the disposition of the proposed amendment.

The parties agree in the briefs filed in this court that, two months after the entry of the judgment, the city council adopted the proposal referred to and amended section 79—1.4 by the addition of the following paragraph: "On or before July 1, 1958, every existing rope-geared hydraulic elevator, steam elevator and gravity elevator (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter." This amendment thus removed the arbitrary classification found to exist when this proceeding was decided. Citing *People ex rel. Toman* v. *Mercil & Sons Plating Co.*, 378 Ill. 142, and *La Salle Na-*

tional Bank v. *City of Chicago*, 3 Ill. 2d 375, which are indeed controlling, the city correctly contends the issue relating to arbitrary classification has become moot rendering unnecessary its review by this court. Appellees concede that the issue raised by the ordinance as it existed at the time of judgment has become moot, but argue that the amendment creates a new discrimination in that owners of hydraulic, steam and gravity elevators are given more time to "depreciate" their equipment, and to install the required devices.

Little merit can attach to the present contention of appellees. Nothing in the record supports the charge that the amendatory paragraph added in 1956 was for any purpose other than a legitimate exercise of the police power directed at protecting human life. On the other hand it is shown that hydraulic, steam and gravity elevators, not being powered by electricity, require more extensive conversion to permit compliance with the ordinance, thus causing need for a greater period of time in which to comply. Under the latter circumstance it must be said there existed a reasonable basis for the legislative distinction complained about. We conclude that the issue of an arbitrary classification between elevators became moot with the amendment of 1956, and that the distinction made in such amendment has a reasonable basis.

Appellees concede the regulation of elevators is a field in which the city has been granted authority to exercise its police power, (See: *Marcovitz* v. *Hergenrether*, 302 Ill. 162,) and agree that section 79—1.4 is perhaps valid when applied to elevators installed in the future. They insist, however, as the trial court found, that its retroactive application to their elevators is an improper exercise of the police power, which is both oppressive and unreasonable.

The power of a governmental body to require changes in existing structures for the protection of health and safety

is the subject of an annotation found in 109 A.L.R. 1117. From the cases there analyzed, and from observations found in 62 C.J.S., Municipal Corporations, sec. 149, the general rule appears to be that while regulations restricting the use of property do not ordinarily have retroactive effect, municipal corporations in the exercise of their police power may, within reasonable bounds, enact ordinances or regulations having such effect. Any definition of the criterion "within reasonable bounds" is of course circumscribed by the facts of each situation, but all authorities are agreed it must appear that the public welfare demands retroactive application, and that the property owners affected do not suffer unreasonable exactions as contrasted with the resulting public benefits.

The application of the foregoing principles has produced varied but consistent results within our own jurisdiction. In *Masonic Fraternity Temple Assn.* v. *City of Chicago*, 131 Ill. App. 1, the court, while saying it could easily conceive of circumstances with respect to physical, social or municipal conditions in which a municipality, in the exercise of properly granted police power, might require existing buildings to be altered to a reasonable degree, refused to give retroactive application to an ordinance requiring additional stairways in buildings of a certain capacity, when it appeared that its effect would be to compel the plaintiff, at great expense and loss of income, to practically demolish and rebuild a nineteen-story structure which had previously complied with all building regulations. On the other hand our courts have found it within reason to give retroactive effect to ordinances requiring: (1) the installation of asbestos curtains and other fire prevention devices in theaters, (*Clarke* v. *City of Chicago*, 159 Ill. App. 20); (2) the installation of fire sprinkling systems in buildings housing sick and infirm, (*City of Chicago* v. *Washingtonian Home of Chicago*, 289 Ill. 206); and (3) the installation of handrails on all stairways in certain types of buildings. *O'Don-*

nell v. *Barach*, 1 Ill. App. 2d 157; *Doran* v. *Boston Store of Chicago*, 307 Ill. App. 456; *DeWolf* v. *Marshall Field & Co.*, 201 Ill. App. 542.

Looking to other jurisdictions we find it was held not unreasonable in *Adamec* v. *Post*, 273 N.Y. 250, 7 N.E. 2d 120, to give retroactive effect to a regulation requiring the installation of more modern sanitary and safety facilities in a case where the alterations in a building assessed at $13,500 would cost $5000. In *City of Seattle* v. *Hinckley*, 40 Wash. 468, 82 Pac. 747, described as a landmark case in the field, an ordinance requiring new type fire escapes on all hotels, office buildings, factories, etc., more than three stories high, was held applicable to existing structures even though some were equipped with fire escapes of a different kind. After stating the public had a right to the safest method of protection that could be found and determined by the municipality, and that the latter had a duty to provide for it, the court concluded: "It would be a sad commentary on the law, if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly faulty method in use was the method provided by law at the time of its construction." Similar sentiments were expressed by our nation's highest court in *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 90 L. ed. 1096, where a New York law requiring the installation of sprinkler systems in existing lodging houses of nonfireproof construction was held constitutional. The court said: "Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. [Citation] Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazard exist, they are adequately safe-

guarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum * * * But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws." 328 U.S. at pp. 82-83, 90 L. ed. at p. 1098.

Although appellees have alleged their elevators are "consistent with the highest standards of health and safety," and have proved compliance with past ordinances, as well as a comparatively low death and accident rate, such factors are no bar to the exercise of the police power granted to the city, nor do they render a requirement for new safety devices oppressive and unreasonable. Based upon advances in engineering, and no doubt upon experience gained during the thirty years appellees' elevators have been in operation, the city has determined that the greatest protection to human life is to be realized by door interlocks which will prevent the operation of elevators unless hatchway gates are closed, and permit the gates to open only when the elevator car is at the gate level. In requiring all power elevators to be so equipped the city has done no more than to exercise its continuing power to make regulations needful to the common good and general welfare, subject to which all property is held. As pointed out in *Clarke* v. *City of Chicago*, 159 Ill. App. 20, the safety of persons using structures or equipment which antedate new protective devices is just as important as the safety of those using subsequently built structures. Because of expert testimony stating it is possible for one with the skill and knowledge to render the interlocks inoperative, thus permitting a return to the old methods of operation, appellees contend the

ordinance will not achieve the protection desired. The possibility that someone will unlawfully defeat the purpose of the ordinance is no test of its reasonableness, nor should it serve to deny those who come onto appellees' property, or use the elevators, of the added protection to which they are entitled. We conclude, even without adverting to the need for correcting the dangerous practices which attend the operation of appellees' elevators, that the retrospective application of the ordinance is both a reasonable and proper exercise of the police power.

For its concluding point the city argues, and we find correctly so, that the trial court erred when it held section 79—106 of the Municipal Code to be void and unenforceable against appellees. It is fundamental that a judgment order must be supported by allegations in the complaint as well as by the evidence. (*Stowell* v. *Satorius*, 413 Ill. 482; *Leitch* v. *Sanitary District of Chicago*, 386 Ill. 433.) The portion of the judgment order relating to section 79—106 does not meet this test.

The judgment of the circuit court of Cook County is reversed.

Judgment reversed.

Judgment of the Trial Court.

This cause coming on to be heard upon the pleadings, proofs taken before a Master in Chancery upon stipulation of the parties, the Master's Report containing his conclusions of facts and law, the exceptions of the parties to said Master's Report, and the arguments of counsel; and the Court having jurisdiction of the parties and of the subject matter, it is HEREBY ORDERED, ADJUDGED AND DECLARED by the Court as follows:

1. Upon motion of defendant, leave be and the same

is hereby granted to file instanter its Supplemental Pleadings.

2. Upon motion *ora tinus* of plaintiffs to strike said Supplemental Pleadings, it is hereby ordered that said Supplementary Pleadings be and the same is stricken as being insufficient in law.

3. There exists an actual controversy between the parties.

4. Section 1.4 of Chapter 79 of the Ordinance of the City of Chicago contains an unlawful classification and is void and unenforceable as to Plaintiffs.

5. Section 1.4 and Section 106 of Chapter 79 of the Ordinances of the City of Chicago do not bear any substantial relation to the public health, safety, comfort, morals and welfare in their retroactive application to the existing elevator installations of the plaintiffs.

Applied retroactively to said existing elevator installations of plaintiffs, said ordinances deprive plaintiffs of the use of their property without due process of law, and are confiscatory and oppressive.

The benefit to the public arising out of the retroactive application of said ordinances to the elevator installations of the plaintiffs is conjectural or slight when compared with the damage to and burden upon the plaintiffs.

Section 1.4 and Section 106 of Chapter 79 of the Ordinances of the City of Chicago are void and unenforceable, as applied to plaintiffs.

The Court certifies that the issues in this cause involves the validity of municipal ordinances and that the public interest requires that if an appeal be prayed from the judgment of this Court, said appeal be taken directly to the Supreme Court of the State of Illinois.

Master's Report.

I, Jacob Shamberg, one of the Masters in Chancery of the Circuit Court of Cook County, to whom the above entitled cause was heretofore referred to take proofs of the respective parties and to report my conclusions of law and fact, after having first given notice to said parties, respectively, of the time and place where said proofs would be taken, and causing to come before me all such witnesses as the respective parties hereto desired, said witnesses having been examined severally on oath and their testimony having been reduced to writing, now report, as follows:

I.

Jurisdiction.

The Court has jurisdiction of the subject of this cause and of the parties hereto, and there is an actual and justiciable controversy between the parties.

II.

Nature of Action.

The present proceedings are for a declaratory judgment that Section 1.4 of chapter 79 of the Municipal Code of the City of Chicago is void or inapplicable to elevators owned or operated by the plaintiffs, respectively.

Section 1.4 reads:

> "On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

III.

Findings.

From the pleadings and competent evidence, I find:

1. The plaintiffs, respectively, are the owners of 141 units (of a total of 166) in six buildings located on South Water Market Street in the City of Chicago in the area bounded by 14th Place on the north, 15th Street on the south, Racine Avenue on the west and Morgan Street on the east.

2. The area is commonly known as the South Water Produce Market District and is the center of distribution for fruits, vegetables and produce.

3. The units are subdivisions of six buildings, each building having a common roof and three stories and a basement, and each unit being separated from others by common walls. Each unit is 24 feet wide and approximately 80 feet deep and has a loading platform at the front and one at the rear. The businesses of the individual plaintiffs or their tenants are conducted within respective separate units, some of the businesses occupying two or more units.

4. The South Water Market District was planned, and its buildings constructed about 30 years ago, as a produce market, and the units involved are used generally for the operation and maintenance of wholesale fruit, vegetable and produce businesses.

5. Each unit here involved contains the same type and size of elevator, viz., one electric traction power freight elevator with hand cable control and electric solenoid (electric magnet) brake, which travels upward and downward, in a hoistway (hatchway) a maximum distance of 33 feet 5½ inches (from basement to third floor) at a speed of approximately 50 feet per minute. These are electric worm gear elevators.

The motive power for each elevator is located at the top of the hatchway and the car is suspended from cables which move it up and down. The motive power is actuated by a continuous cable which runs from the top of the hatchway to the bottom of the hatchway along side of the car, in two lines. A hand directional movement of either line actuates the control and causes movement. Between these two lines there hangs a center line rope which applies the brake when pulled downward. These cables are inside of the hatchway at one side and about three feet from the front of the hatchway. Each elevator is located at the rear of each unit. There is an opening into the hoistway at each level of the building. The openings at the first, second and third floor levels have gates which are horizontal sliding panels, center bi-parting, the halves sliding away from one another on vertical plane. These doors or gates are either wire mesh or solid with glass in the upper panel which permits vision into the hatchway. The latter type is known as the "Meeker" type. These gates, when in normal operating order, close automatically as the elevator car moves away from the floor, but can be opened from the exterior by hand pressure at any floor, even though the car is not at that floor. At the basement level there are solid steel doors, center bi-parting vertically, the halves being hinged at the side. The latter doors are also fire doors. These doors do not close with the movement of the car.

6. Each unit has a stairway located midway between the front and rear of the unit, and the stairway runs from level to level. There is also a stairway from the outside sidewalk (loading dock) down to the basement.

7. These elevators are generally operated by employees of the occupants, freight handlers known in the trade as "porters" or "hustlers." The practice is to have these "hustlers" use these elevators in connection with the trans-

fer of produce on hand trucks from the exterior of a unit into the unit and from floor to floor. In each instance several (two or more) "hustlers" use the same elevator during the same working period and they do so alternately. The following illustrates the typical operation:

Assuming that an elevator is at the third floor level and that the "hustler" who took it there has removed his hand-truck to some part of the third floor and is away from the elevator, a "hustler" at another level opens the doors at that level, looks for the car and yells, up or down the shaft depending where the car is, for permission to move it. Upon assent, vocal or silent, the second "hustler" reaches into the hatchway and pulls the nearest cable, upward to move the car downward and downward to move the car upward. When the car reaches his level and while it is moving, he reaches into the hatchway and grabs a hand center line rope which hangs from the machinery located at the top of the hatchway and travels through a course attached to the car, and pulls that rope and thus causes the application of the brake and the halting of the car. The second "hustler" cannot cause the car to move if the first "hustler" has applied a hand cable lock (located in the car), the function of which is to grip one of the cables and prevent the cable from being moved and thus prevent actuation of the motive power of the elevator. If the first "hustler" has not applied the hand cable lock or if it does not hold properly, the car may be moved away from his location by the above remote operation.

8. The elevators are generally operated only by "hustlers" and there is no evidence establishing any practice that the public or any persons (other than "hustlers") generally are carried on such elevators, although occasionally a customer will accompany a "hustler." However, the floor areas near the hatchway, especially the first floor area, appear to be accessible to others than the "hustlers."

9. Insofar as the record in this cause discloses, the accident history of the South Water Market is good when considered in relation to 30 years' operation of 141 elevators, the number of casualties shown here to have occurred is only five (two fatal), the last having occurred about 18 years ago.

A tabulation of accidents reported to the City Elevator department for the period from 1940-1955 shows none reported as having occurred at the South Water Market, and shows with reference to different types of elevators the following totals:

E. W. G. Freight	167
E. W. G. Passenger	124
Gearless Passenger	17
Rope Geared Hydraulic Passenger	11
E. D. W. G. Freight	8
E. B. W. G. Freight	7
Hydraulic Freight	7
Hand Power Freight	6
Rope Geared Hydraulic Freight	3
Gearless Freight	2
E. W. G. Manlift	2
Hydraulic Lift	2
Hydraulic Passenger	1
E. D. W. G. Passenger	2
E. W. & S. G. Freight	1
Steam Freight	1
Friction Freight	1
S. B. S. G. Freight	1
Hydraulic Sidewalk Freight	1
E. W. G. Service	1
Empty Hatch	1
(E. W. G. indicate electric worm gear elevators)	
Total	366

The records of the city department do not indicate the number of accidents occurring on hand cable operated elevators.

10. The elevators at the Market were originally installed by the Reliance Elevator Company which has since kept a service force at the Market, and, under contract, it makes regular inspections and tests of the elevators and renders services and makes repairs as necessary.

11. These elevators have been inspected periodically by the City Elevator Department of the City of Chicago and have been approved as complying with city ordinances up to July 1, 1954. Thereafter the said department refused to approve the elevators and served notice that changes, alterations and repairs were necessary in order that the elevators be made to comply with section 79-1.4 of the Municipal Code.

12. Section 79-1.4 (a new provision) was adopted by the City Council on July 16, 1952, in the following form, viz.,

> "On or before July 1, 1953, every existing power elevator shall be equipped (or such equipment) shall have been contracted for with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter."

13. Thereafter on July 28, 1954, the said section was amended to provide (as it does now) that:

> "On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

14. In section 79-2 of the Municipal Code there are found, the following pertinent definitions:

> "*Elevator.* A raising and lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction, further defined as the following types:
>
> "(d) Electric elevator. An elevator operated by

an electric motor directly applied to the elevator machinery.

"(e) Freight elevator. An elevator designed for carrying freight and the operator and persons necessary for loading and unloading.

"(f) Gravity elevator. An elevator in which gravity is the source of power.

"(h) Hydraulic elevator. An elevator operated by liquid under pressure.

"(1) Plunger elevator. A hydraulic elevator having a ram or plunger directly attached to the under side of the car platform.

"(2) Rope geared hydraulic elevator. A hydraulic elevator in which the movement of the car is obtained by multiplying the travel of a piston or ram by a system of sheaves over which the hoisting ropes operate.

"(i) Passenger elevator. An elevator which is designed to carry persons.

"(j) Power elevator. An elevator operated otherwise than by gravity or manually.

"(n) Steam elevator. An elevator operated by a steam engine directly applied to the elevator machinery.

"*Hatchway.* The space in which an elevator or dumbwaiter is designed to operate.

"*Hatchway door or gate.* The hinged or sliding portion of the hatchway inclosure for access to the car at any landing.

"*Hatchway door interlock.* A device, the purpose of which is to prevent the operation of the machine to move the car away from a landing unless the hatchway door at the landing is locked in the closed position; and to prevent the opening of the hatchway door from the landing side except by special key, unless the car is at rest within the landing zone, or is coasting through the landing zone with its operating device in the stop position.

"(a) Door unit interlock system. An interlock system which requires that the hatchway door at which the elevator is standing must be locked in the closed position before the elevator can leave the landing, but which does not prevent the operation of the car if other doors in the hatchway are not locked.

"(b) Hatchway unit interlock system. An interlock system which will prevent the operation of the car unless all hatchway doors are locked in the closed position.

"*Hatchway enclosure.* Any structure which separates the hatchway, either wholly or in part, from the floors or landings through which the hatchway extends.

"*Hatchway unit contact system.* A contact system which will prevent the operation of the car unless all hatchway doors are closed.

"*Machine.* The machinery and its equipment used in raising or lowering the car or platform, of the following types:

"(a) Direct-drive machine. A machine in which the power is transmitted directly to the driving sheave or sheaves without intermediate mechanism or gears.

"(b) Spur-geared machine. A machine in which the power is transmitted to the driving sheaves or drum through spur gearing.

"(c) Traction machine. A machine in which the movement of the car and counterweight is obtained by means of traction between the driving drum, sheave or sheaves and the hoisting cables.

"(d) Winding drum machine. A machine in which the cables are fastened to and wind on a drum.

"(e) Worm-geared machine. A machine in which the power is transmitted to the driving sheaves and drum through worm gearing.

15. The elevators at the Market are power elevators as are rope geared hydraulic elevators, steam elevators and gravity elevators (friction), and all travel in hoistways and have openings at floor levels.

16. A rope geared hydraulic elevator has no electric brake, and is operated either by a direct hand-pull cable (as are the subject elevators) or by a lever inside the car which controls the operating cable through a series of "sheaves" directly underneath the car on which an operating cable is roped. This cable is known as the "tiller" rope. "Sheaves" are grooved wheels on which the cables

are wound. There is no electric brake on such an elevator. Elevators of this type having a lever in the car require an operator inside of the cab to move the car.

A rope geared hydraulic elevator which is hand cable controlled operates in the same manner as the elevators at the market, can be operated from outside of the car, and "hustlers" could make alternate use of such a rope geared hydraulic elevator as they are making of the elevators at the market, i. e., the car could be moved from another level through the cables.

17. A steam elevator is controlled by an operator in the car by movement of a lever hanging from the top of the car, and cannot be operated from outside of the car. Such elevators do not have electric brakes.

18. A gravity elevator (friction) descends without power and rises by friction applied to a continuously running belt moved by electrical power. This requires an operator within the car to move the controls so as to engage the belt for upward movement and to disengage the belt for downward movement. For upward movement two cars may rely upon the same moving belt. Such elevators do not have electric brakes.

19. As indicated above, the subject elevators are electric traction, moving upward and downward by force applied directly to the machinery, are hand cable operated and may be controlled from outside of the car. They have electric magnetic brakes.

20. "Hatchway door interlocks of the hoistway unit system" contemplate a device, the purpose of which is to prevent the operation of the machine to move the car away from the landing unless the hatchway door at that landing is in a closed position and unless all hatchway doors are locked in the closed position.

21. The interlock system depends on electrical control

of the movement of the elevator and can be applied to the elevators at the Market since they are electric traction elevators, but the application of an interlock system to rope geared hydraulic elevators, steam elevators and gravity (friction) elevators cannot be made since there is a complete absence of electrical control in the case of the rope geared and steam elevators and partial absence in the case of the gravity (friction) elevator (and even if an electrical controls could be devised for steam and gravity elevators the change would be so material as to require completely new elevators under City Code provisions which apply in the event of major alterations but not otherwise).

22. The application of an interlock system to the elevators at the South Water Market will, under the view of the plaintiffs, prevent the alternate use of an elevator by several "hustlers" since a "hustler" on a landing where the car is not situated could not move the car to his level since he cannot open the gates at his level because of the interlock, even though all other gates are closed. If he does open the gates by a special key, he interrupts the electrical circuit and cannot move the car anyway. However, it seems that a "hustler" could, without opening the gates at his level, through a handhole in the side of the hatchway where the handcables may be reached, move the car, provided that he has obtained clearance from the other "hustler" who has the car and provided that other "hustler" has closed the gates at his floor. The efficiency or safety of such an operation was not shown in the record here.

23. "Interlocks" may be plugged and this may be done by one person without the knowledge of others making use of the elevator, and the others, relying on the interlocking system being in operation, may be misled by trying to open gates and having the gates open without the car being at the floor. However, there are indications that the "inter-

locks'' could be so placed in a hoistway or so covered as not to be accessible. Properly installed and not tampered with, ''interlocks'' are an additional safety factor.

24. The installation of interlocks would require the installation of electrical sequence relays, the definition of which does not seem to be important here, and the total cost of such an installation (interlocks and relay) is estimated at about $700.00 per car.

25. The plaintiffs take the view that they cannot operate their elevators for their businesses with the installation of ''interlocks'' and that they will be forced either to install ''continuous-pressure'' operating cars which operate with ''up'' and ''down'' buttons or an ''up'' and ''down'' switch in the car and at each landing, except the terminal landings, at each of which there may be one button or switch, any one of which may be used to control the movement of the car in the direction for which the button is pushed or the switch actuated, but only so long as the button or switch is manually held in the operation position (landing stops are not automatic) at an estimated cost of $2400.00 per elevator; or ''automatic'' operating cars which operate by means of buttons or switches, both in the car and at the landings, the momentary pressing of which will cause the car to start and stop automatically at the floor corresponding to the button pushed, at an estimated cost of $2800.00.

26. An alternative to continuous pressure or automatic operation with interlocks is the employment of a full time elevator attendant at a salary estimated at about $4000.00 per year.

27. The records of the City Elevator Department show that there are 7286 electric freight elevators in the City of Chicago, but these records do not show how many of these 7286 elevators are of the hand cable operated type such as found at the South Water Market District.

28. These records show that there are 119 rope geared hydraulic elevators in the City of Chicago (66 passenger, 49 freight and 4 combination); 24 steam elevators (2 passenger and 22 freight); and 93 friction elevators (all freight).

IV.

Principles of Law Involved.

1. Municipal corporations can exercise only delegated powers, and in the absence of express statutory provisions to that effect courts are not authorized to indulge in any presumptions in favor of the existence of the power. (*Biffer* v. *City of Chicago*, 278 Ill. 562, 569.)

2. The power to pass an ordinance like the one in question here is implied, however, from the provisions of the Sections hereinafter mentioned. Section 23-105, Chapter 24, gives the City Council the power to pass and enforce all necessary police ordinances. Section 23-61 gives it the power to declare what shall be a nuisance and to abate the same. Section 23-81 authorizes it to do all acts and make all regulations which may be necessary or expedient for the promotion of health. These sections together with section 23-105 which gives the City Council authority to pass and enforce all necessary police ordinances authorize a City to make any regulations concerning elevators necessary for the promotion of the safety and health of its inhabitants. (Cf. *Marcovitz* v. *Hergenrether*, 302 Ill. 162, 168, involving an ordinance concerning protection of elevator hoistways, etc.)

3. The existence of the City's power to legislate on the subject matter of the ordinance in question being established, the ordinance is presumed to be reasonable (*Ferguson Coal Co.* v. *Thompson*, 343 Ill. 20) and the next inquiry is whether the ordinance is a reasonable exercise of the power. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246.)

4. Whether there exists any connection between a given ordinance and the police power claimed to be exercised thereby, and whether such ordinance is a proper exercise of such power or whether the ordinance is unreasonable and arbitrary, are primarily questions for legislative determination. The City Council is the judge, in the first instance, of those matters, and unless the exercise of its judgment and discretion is manifestly unreasonable, the courts will not declare the ordinance invalid. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246, 257.)

5. The party attacking an ordinance as an unreasonable or oppressive exercise of the police power, has the burden to affirmatively and clearly show wherein the unreasonableness exists (*Chicago* v. *Washingtonian Home*, 289 Ill. 206, 213) and where there is a difference of opinion the court will accept and abide by the legislative determination (*Midland Elec. Coal Corp.* v. *Knox County*, 1 Ill. 2nd 200).

6. There is no inherent or vested right in property owners which prevents the City Council from passing an ordinance under the police power which is applicable to existing structures even though the structures complied with the law in force at the time the structures were built. (*Clarke* v. *City of Chicago*, 159 Ill. App. 20.)

7. Ordinances must be uniform, fair and impartial in their operation, must be reasonable and not arbitrary, must not discriminate against those of the said class, and must apply to all of a class. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246, 258.) Where statutes are enacted in the exercise of the police power, only those statutory classifications are valid which are based on reasonable grounds of distinction with reference to the object of the legislation (*Northern Ill. Coal Corp.* v. *Medill*, 397 Ill. 98, 106-107), and if there is no reasonable grounds for distinction, then the exception is invalid and the entire ordinance is invalid (*Chicago Park District* v. *Canfield*, 382 Ill. 218, 225).

V.

Conclusions.

1. The City Council had the power to pass section 79-1.4 of the Municipal Code, concerning interlocks, and to make it retroactive in application. It is to be remembered that "hustlers" are members of the public to be protected.

2. There is no evidence to overcome the presumption that there was a reasonable exercise of police power in requiring interlocks. (Even the elevator expert testifying for the plaintiffs, considered interlocks to be an additional safety device if not tampered with, although there is a difference of opinion between him and experts testifying for the City as to whether interlocks can be tampered with. The Court cannot substitute its opinion for that of the City Council that interlocks are necessary, however.)

3. The application of the ordinance to the elevators of the plaintiff is unreasonable, however, because the ordinance excepts "rope-geared hydraulic elevators, steam elevators and gravity elevators (friction)" which are all power elevators travelling vertically in hoistways with openings at floor landings and are similar in movement and exposure to the same dangers as are the plaintiff's elevators. (It is to be noted that an elevator expert testifying for the City of Chicago in favor of the application of interlocks saw no reason to exclude rope geared hydraulic elevators from the requirements.)

4. The ordinance creates an unlawful classification, discriminating in its nature, which renders the ordinance invalid. There is no reasonable ground upon which this classification can be made. It bears no relation to the object and purposes of the ordinance, its only effect is to permit elevators in the excepted category to escape the ordinance even though doors to their hoistways may be opened while elevator cars are moving and the public safety

thereby endangered. Since public safety requires "interlocks," it is discriminatory to exclude any elevators whatsoever, and to impose sanctions on the plaintiffs and not on the owners of buildings having elevators of the excepted category. To grant the latter immunity from the operation of the ordinance is to deny the equal protection of the law to the plaintiffs.

5. Even though the owners of the other elevators may be forced to expend more money than the plaintiffs, this difference is no concern of the City Council and no basis for classification since public safety does not concern itself with the pocketbooks of the individuals required to expend money to meet the requirements.

VI.

Recommendation.

I recommend that the Court enter a judgment declaring that the City Council has the power to pass the ordinance in question but that the ordinance is unenforceable and void because it contains an unlawful classification.

APPENDIX B.

Ordinance of the City of Chicago.

"On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

"On or before July 1, 1958, every existing rope-geared hydraulic elevator, steam elevator and gravity elevator (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter.

SECTION 2. This ordinance shall be in force and effect from and after its passage and due publication."

(Additional pertinent sections of the Municipal Code of Chicago, including definitions of the terms employed in the ordinance are fully set forth within the Master's Report, Appendix A, Pages 24-26.)